

March 30, 2011

*VIA EMAIL* [awlaputz@waterboards.ca.gov](mailto:awlaputz@waterboards.ca.gov)

Central Valley Regional Water Quality Control Board  
11020 Sun Center Drive, #200  
Rancho Cordova, CA 95670

Attn: Adam Laputz

Re: Comments on Irrigated Lands Regulatory Program Framework Documents

Dear Mr. Laputz:

The organizations identified below have reviewed the Recommended Long-Term Irrigated Lands Regulatory Program Framework (Framework) as released by the Central Valley Regional Water Quality Control Board (Central Valley Water Board) in March of 2011, as well as the other associated materials including the Final Environmental Impact Report (Final EIR). Overall, the below named organizations appreciate the Framework's attempt to maintain third-party groups (i.e., coalitions) and their role in administering the Central Valley's Irrigated Lands Program. As has been shown over the last seven years, the coalitions and commodity organization administering this program provide a valuable service and connect with the many growers in the Central Valley in a manner that the Central Valley Water Board is unable to accomplish. Thus, maintaining the coalition structure and function is vital to the continued success of this program.

However, based on our review of the Staff Report, the Framework, our previous review of the Draft Program Environmental Impact Report (DPEIR), and the Final EIR, we must express concerns with a number of the provisions within the Framework, as well as the Central Valley Water Board's compliance with the California Environmental Quality Act (CEQA). In general, we have several concerns with the Framework and its proposed requirements, which include the fact that the Framework (both the original version in the DPEIR and the March 2011 version) was not a specified alternative analyzed pursuant to CEQA. Further, as currently proposed, the Central Valley Water Board will consider adoption of the Framework without accurate cost estimates for this program. Our specific comments on these and other issues are provided below.

As a preliminary matter, many of our comments submitted on September 27, 2010, are still applicable and have not been addressed. Thus, our previous comments are incorporated by reference herein. In an effort to avoid duplication, we have not repeated our previous comments; rather, the comments in this letter focus on changes to the Framework not addressed previously and re-emphasize our issues of primary concern.

**I. Framework Proposes Significant New Requirements for Farm-Specific Evaluation**

As proposed in March, the Framework includes a significant new requirement for all irrigated agricultural operations. Specifically, the Framework would require all operations to complete a farm-specific evaluation that includes identification of management practices. The Framework suggests that the farm-specific evaluations would need to be available for Central Valley Water Board inspection. However, the Framework also suggests that the farm-specific evaluations may need to be submitted to the Central Valley Water Board. (See, e.g., Framework at p. A-14 [“prior to the availability of the required information technology infrastructure to achieve this goal, the Board may allow the individual discharger to retain documents on-site . . . .”].) By leaving open the issue of whether submittal of farm-specific evaluations to the Central Valley Water Board will be required (and, consequently, whether the evaluations will be public documents potentially subject to disclosure under the Public Records Act), the Framework causes great concern for several reasons.

First, farm-specific information is personal, proprietary/trade information that should not be subject to public disclosure. The Central Valley Water Board needs to remember that many farmers/growers live on the farms where they grow crops, and the submittal of farm-specific information is business information as well as personal information.

Second, although the Porter-Cologne Water Quality Control Act (Porter-Cologne) does not contain a citizen suit provision, the regulated community is currently seeing a proliferation of lawsuits filed directly against individuals and/or agencies claiming violations of Porter-Cologne under various theories. It is anticipated that their ultimate goal, as it is with many of the Clean Water Act lawsuits, is to settle the claim and obtain significant attorney’s fees for their time and effort. The submittal of farm-specific evaluations that is subject to disclosure upon request under the Public Records Act creates tremendous concern of potential liability for Central Valley growers in this respect.

Third, we fail to see how the submittal of farm-specific evaluations advances the Central Valley Water Board’s goal of improving water quality. At most, the submittal of such information for over 25,000 growers will simply create reams of electronic data files with little ability for staff to review the information in any significant manner.

Further, even if the Central Valley Water Board determines that such a requirement is advantageous, the Central Valley Water Board is prevented from adopting this requirement into the Framework because it was not evaluated in the DPEIR and because there is no cost

estimate developed for this requirement. Thus, until a proper environmental and cost analysis is prepared for such a requirement, the Central Valley Water Board cannot include it in the Framework.

To the extent that the Central Valley Water Board determines farm-specific evaluations should be developed, all such information should be retained on the individual farm, or at most, its completion should be verified by the applicable coalition. In both cases, the Central Valley Water Board could have access to the evaluations on the farm or at the coalition offices, without potentially invoking the state's Public Records Act requirements.

## **II. Framework Continues to Require Stakeholder Input for Water Quality Management Plan Approval**

Although significant concerns were raised in previous comments, the proposed Framework maintains the provision for Central Valley Water Board staff to meet with third party groups, as well as other interested parties, to evaluate the sufficiency of Surface Water Quality Management Plans (SQMPs) and Groundwater Quality Management Plans (GQMPs). (See Framework at pp. A-18 - A-19.) As we indicated previously, such a requirement is unprecedented and has no legal basis. Specifically, the Central Valley Water Board represents the public interest and, therefore, it is unnecessary for other stakeholders to participate in reviews at this level. SQMPs/GQMPs are designed to identify management practices that would be appropriate and applicable for the constituent of concern and the watershed in question. Thus, Central Valley Water Board review on the sufficiency of SQMPs/GQMPs is appropriate. While the SQMPs/GQMPs are public documents once submitted to the Central Valley Water Board, they are not the type of documents that require Central Valley Water Board approval and, therefore, they are not subject to formal public review and comment.

Although not specified in the Framework, we anticipate the development of SQMPs/GQMPs would be required pursuant to the Central Valley Water Board's authority under Water Code section 13267. Section 13267 allows the Central Valley Water Board to require the submittal of technical and monitoring reports as long as the burden of preparing the report bears a reasonable relationship to the need for the report and the benefits to be obtained. Nothing in section 13267 requires that such reports be subject to public review or comment or be open for discussion with other interested parties.

In all of the Central Valley Water Board's other programs, individual dischargers are not required to have management plans reviewed periodically by other interested parties. Typically, when dischargers are required to submit special studies or management plans, the plan is submitted to the Central Valley Water Board staff for review and comment, revised based on Central Valley Water Board staff comments, and then implemented. At most, the municipal stormwater program requires that stormwater management plans be subject to public review, comment, and adoption by the Central Valley Water Board. However, this requirement for municipal stormwater management plans stems from federal NPDES permit

requirements and is not applicable here. (See *Environmental Defense Center v. EPA* (9th Cir. 2003) 344 F.3d 832, 856.)

Further, by allowing other interested parties to evaluate the sufficiency of SQMPs/GQMPs, the process may be stalled with protracted negotiations between all of the parties in the event there is disagreement about what is “sufficient.” There is no need to adopt a process that has the potential to result in such stalemates. Under the existing process, if interested parties have concerns with the sufficiency of SQMPs/GQMPs, they may express their concerns to the Central Valley Water Board at any time.

Thus, to avoid unnecessary delays and to avoid creating a new precedent, we encourage the Central Valley Water Board to remove this requirement from the Framework. At most, the Central Valley Water Board should specify in the Framework that the SQMPs and GQMPs are public documents available on request, but remove all references that would suggest Central Valley Water Board staff will actively pursue meetings with “other interested parties” to discuss the sufficiency of such documents prior to Executive Officer approval.

### **III. The Framework Contains New Requirements That May Have Significant Environmental Impacts Not Analyzed in the DPEIR**

The Framework is likely to result in the imposition of new burdens on irrigated agricultural operations that would have a significant and cumulatively considerable impact on the environment. In attempting to justify the fact that no environmental review was performed for several elements contained in the Framework, the Staff Report states that “[a]s long as the adopted program falls within the range of alternatives analyzed and the appropriate findings have been disclosed, the Board may adopt a program that is a variation on the alternatives analyzed without the need to conduct additional CEQA analysis.” (Staff Report at p. 7.) However, the Framework does not represent merely a “variation” on the alternatives in the DPEIR and Final EIR, but rather includes several new elements, the impacts of which have not been analyzed at all. For example, the Framework requirement that all irrigated agricultural operations in all tiered areas must complete a farm-specific evaluation and identification of management practices for Central Valley Water Board inspection is a significant new development.

A lead agency is required to re-circulate an EIR “when significant new information is added to the EIR after public notice is given of the availability of the draft EIR for public review under Section 15087 but before certification.” (Cal. Code Regs., tit. 14, § 15088.5(a).) Significant new information requiring re-circulation includes, but is not limited to, any new significant environmental impact that would result from the project and/or any new mitigation measure proposed to be implemented. (*Id.*, § 15088.5(a)(1).) The Framework contains significant new requirements, including the farm-specific evaluation, a new tiering structure, and a nutrient management plan requirement for specified operations. Each of these changes could have significant and identifiable environmental impacts, including but not limited to, direct, indirect, and cumulative impacts on agricultural resources in the form of increased

costs and greater potential for loss of agricultural land, and decreased irrigation return flows or availability of irrigation water for groundwater recharge. These additional requirements in the Framework were not included in the DPEIR or Final EIR, and therefore the public was not provided with a meaningful opportunity to comment on the potentially substantial adverse environmental effects of the proposed project. In this way, the project description itself is unstable and represents a moving target for the public and irrigated agricultural operations. Under the CEQA Guidelines, the Central Valley Water Board is required to analyze the potential impacts of the proposed project and to re-circulate the EIR for public review and comment.

Moreover, as noted in previous comments, the DPEIR and Final EIR did not analyze the environmental impacts of the actual project. In evaluating the significance of the environmental effect of a project, the lead agency must consider direct physical changes in the environment and reasonably foreseeable indirect physical changes in the environment, which may be caused by the project. (Cal. Code Regs., tit. 14, § 15064(d).) The Framework that is now being proposed as the project was derived, in part, from components of the alternatives that were analyzed. However, neither the DPEIR nor the Final EIR actually analyze the project that is now proposed, the Framework. While the DPEIR did analyze the environmental impacts associated with some of the proposed project's components, no CEQA document has ever analyzed the environmental effects of these elements combined with each other, as is now proposed under the Framework.<sup>1</sup>

Now, the Staff Report and Framework are proposing the addition of previously unanalyzed requirements that will add *new* significant environmental impacts to a program that was never analyzed properly in the first place. Specifically, the Framework includes the new requirements identified above that have the potential to significantly increase costs for irrigated agricultural operations and result in foreseeable impacts to agricultural resources and other indirect effects stemming from such changes in land use. Yet there is no consideration of the actual impact of those changes in the Framework, Staff Report, DPEIR, or Final EIR. For example, the Staff Report states that “staff believe that a requirement for farm-specific certified nutrient management plans in Tier 3 groundwater areas is reasonable and will catalyze reductions in nitrate inputs from irrigated agriculture.” (Staff Report at p. 5.) Similarly, the Staff Report asserts that “[t]he only potential impact associated with nutrient management is additional planning and management costs, which may be largely offset by savings to fertilizer material and operations.” (*Id.* at p. 14.) There is no support cited for either of these statements, nor any support for the assessment that the costs of complying with this new requirement can be offset by purported savings. In short, the record lacks any substantial evidence to support these conclusions. The staff “analysis” is nothing more than a conclusory assertion, which is insufficient to satisfy the requirements of CEQA. The PEIR is required to look at the whole of the project-related effects—direct, indirect, and cumulative—

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<sup>1</sup> The same argument also applies to the proposed regulatory program that was included in an appendix to the DPEIR.

in order to give the public and decision makers an accurate picture of the true impacts of the proposed project. The Central Valley Water Board cannot satisfy this requirement by failing to analyze the actual project in the DPEIR and subsequently adding new elements into the Framework arguably creating a completely new project that will result in significant environmental impacts and failing to analyze them altogether.

#### **IV. The Framework Constitutes an Underground Regulation in Violation of the California Administrative Procedure Act (APA)**

Regulations adopted by state agencies must be adopted consistent with the procedural requirements of the APA (Gov. Code, § 11340 et seq.), unless they qualify as one of the specifically enumerated exemptions. The definition of a regulation includes “every rule, regulation, order, or standard of general application or the amendment, supplement, or revision of any rule, regulation, order, or standard adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure.” (*Id.*, § 11342.600.) A regulation that is adopted inconsistent with the procedural requirements of the APA is an “underground regulation” which may be invalidated for failure to comply with the strictures of the APA. Policies, plans, and guidelines adopted by the state and regional water boards are subject to specific provisions of the APA (*id.*, § 11353), and if regional board adopted plans and/or policies fail to comply with such provisions, they too are underground regulations.

This Framework is a policy, plan, or guideline that will be the basis for future actions, and it is admittedly a policy of general application in that it governs and guides the Central Valley Water Board’s adoption of subsequent orders. However, it appears that the Board is unlikely to meet the requirements for adopting the policy pursuant to the Government Code. (Gov. Code, § 11353.) Most notably, the Central Valley Water Board indicates no intent to submit the Framework to the Office of Administrative Law (OAL) prior to it becoming effective. As part of this submission, the Central Valley Water Board would need to provide the OAL with a clear and concise summary of any regulatory provisions approved as part of the Framework for publication in the California Code of Regulations, the administrative record for the proceeding, and a summary of the necessity for the regulatory provision. (*Id.*, § 11353(b).) The Framework, as a policy, plan, or guideline, does not become effective unless and until the Central Valley Water Board submits such information and the regulatory provisions are approved by the OAL in accordance with other provisions of the APA. (*Id.*, § 11353(b)(5).) This Framework contains significant new regulatory requirements that will be binding on irrigated agricultural operations, including the farm-specific evaluations, a new tiering structure, and a nutrient management plan requirement for specified operations. The Central Valley Water Board’s intended decision to adopt the Framework without complying with these provisions of the APA would be inappropriate.

Moreover, the Staff Report denies that this Framework constitutes a regulation, and hence provides the public and regulated community with no meaningful opportunity to comment on and treat it as such. Specifically, the Staff Report contends that the Central Valley Water Board's resolution adopting the Framework "will not adopt the Framework as a rule or regulation; therefore, it will not be binding on subsequent Board actions on irrigated lands." (Staff Report at pp. 12-13.) However, this belies the true impact of the Framework and its role in the ongoing ILRP process. For example, the Staff Report indicates that, to the extent that the Central Valley Water Board adheres to the Framework in its subsequent orders, additional environmental analysis under CEQA will not be necessary. (*Id.* at p. 13.) In addition, the Staff Report describes the Framework as a general structure for the Central Valley Water Board to consider as the implementing orders are developed. Orders are to be adopted that are consistent with the Framework and, therefore, the Framework has the effect of regulation by de facto requiring compliance with its terms. This is clearly an important and influential document with tangible requirements that will have real regulatory consequences, yet it is unlikely to go through the appropriate procedures required under the APA. Thus, the Framework is an underground regulation, and its adoption without such review would violate the APA.

**V. The Framework Fails to Adequately Analyze the Economic Impacts of the Program and Does Not Comply With Water Code Section 13141**

The Staff Report acknowledges that Porter-Cologne, and specifically Water Code section 13141, requires the Central Valley Water Board to estimate the total cost of an agricultural water quality control program and the potential sources of financing. (Staff Report at p. 10.) Unfortunately, the brief analysis within the Framework and scattered references to the economic analysis contained in the DPEIR are insufficient to meet this statutory requirement.

First, the sequence of adopting this Framework and subsequently committing to identifying the costs of such program into the relevant basin plan at some point in the future is unsupportable under Porter-Cologne. Specifically, Water Code section 13141 requires that "*prior to* implementation of any agricultural water quality control program, an estimate of the total cost of such a program, together with an identification of potential sources of financing, shall be indicated in any regional water quality control plan." (Wat. Code, § 13141, emphasis added.) The adoption of the Framework represents the beginning of implementation of an agricultural water quality control program, and the Central Valley Water Board has not yet provided (in the relevant regional water quality control plans) an estimate of the total cost of the program, or identified potential sources of funding for the program. The Staff Report indicates that "[t]he estimated total cost and potential sources of financing will be incorporated into the Basin Plans *after* approval of the ILRP Framework." (Staff Report at p. 26, emphasis added.) The Central Valley Water Board's adoption of this Framework represents the initial stage of implementation of an agricultural water quality control program. Although the program will be subject to further development as the specific requirements are

imposed in future orders, the adoption of the Framework will initiate implementation of the ILRP, and it will serve as the basis for future action and a foundational element of the overall ILRP. The Staff Report itself seems to acknowledge this, indicating that “if the Board adheres to the Framework in its subsequent Orders” additional environmental analysis would not be necessary. It is inconsistent for staff to take the position that, on the one hand, the Framework serves as a tool to avoid future analysis of environmental impacts, but, on the other hand, the Framework is not part of the implementation of the overall agricultural water quality control program: if the Framework constitutes the “program” for purposes of CEQA review, it also constitutes the program for purposes of the Porter-Cologne requirements.

The Staff Report includes only a cursory examination of the costs of the program and potential sources of financing. (Staff Report at pp. 30-34.) This analysis is not sufficiently detailed to give the affected community a real sense of the costs of the program, nor has it been “indicated in any regional water quality control plan” as required under the Water Code. Moreover, this cost examination is admittedly based on different assumptions than those analyzed in the economic analysis contained in the DPEIR. According to the Staff Report, “[a]n estimated total cost of the recommended ILRP Framework also has been developed and differs from the estimation approach used for the six alternatives. . . .” (*Id.* at p. 30.) The Framework contains potentially costly and time-consuming additional requirements, such as the requirement that all irrigated agricultural operations in all tiered areas complete a farm-specific evaluation and identification of management practices for Central Valley Water Board inspection. The costs of such requirements were not analyzed in the DPEIR and accompanying economic analysis, and are not described in sufficient detail in the Staff Report or the Framework to give irrigated agricultural operations a true sense of the costs of the program.

Finally, the economic impacts analysis contained within the DPEIR and referred to in the Framework is flawed and does not form a sufficient basis for estimating the true costs of this program. Specifically, as noted in a number of the previous comments to the DPEIR, that economic analysis fails to address a number of the costs that will be incurred as a result of implementation of the ILRP and the proposed alternative. These costs include, but are not necessarily limited to, nutrient management, irrigation practices, and the installation and operation of monitoring wells. The cost of compliance could be in the range of hundreds of millions of dollars, yet these costs are not substantially addressed by the economic analysis. Furthermore, the economic analysis contains numerous generalities and understated assumptions that prevent the reader from attaining a genuine picture of the actual costs and economic impacts of the various alternatives. In sum, the economic analysis purportedly supporting the Framework, including the brief cost estimates contained in the Staff Report and the flawed economic analysis contained in the DPEIR, are insufficient to meet the statutory requirements of Water Code section 13141 and fail to convey the true costs of the program.



## **VI. The Proposed Implementation Timeframe Remains Far Too Aggressive**

We remain concerned that the timeframe for implementation identified in the Framework is far too aggressive and affected irrigated agricultural operations may be unable to meet the recommended deadlines. An anticipated full implementation deadline of three years as identified in the Framework is far too aggressive. It has taken nearly three years of stakeholder input and comments simply to get the ILRP to this point, and to expect that the new program will be fully in effect in that same timeframe is unrealistic. It is overly optimistic to expect that the coalitions and the Central Valley Water Board can fully implement a new long-term program that includes a variety of significant changes from the previous system in a brief three-year time period.

Moreover, the time schedules for compliance are arbitrary and not related to a determination of being able to meet the proposed schedules. Both the surface water quality and the groundwater quality schedules state that compliance schedules may be staggered between five and ten years, but cannot exceed ten years. (Framework at p. A-25.) Until there is a specific analysis for individual pollutants, it is premature to state that compliance schedules cannot exceed ten years. There is nothing in Porter-Cologne or state regulations that limits compliance schedules to ten years for non-point source discharges. Further, for many constituents, ten years is not practical. For example, for legacy pollutants, such as DDT and mercury, it may well take more than ten years for certain surface waters to comply with adopted water quality standards. However, if the current draft of the Framework were adopted, such schedules of compliance could not exceed ten years. To avoid such arbitrary results, we recommend that the Framework suggest that compliance schedules generally should not exceed ten years, but that the Central Valley Water Board has the discretion to set appropriate compliance schedules based on the information presented by the coalition groups and the commodity group at the time of establishing individual orders. We also recommend that any compliance schedules be used as general guidelines for ensuring water quality improvements, but with the understanding that, for non-point source discharges, hard and fast compliance with such schedules is difficult and not completely within the control of irrigated agriculture as these waterbodies are subject to inputs from many other sources.

## **VII. The Framework Creates a New Tiering Structure Not Analyzed in the DPEIR**

Framework sections 4.2 and 4.3 indicate that a tier designation will be assigned to each constituent in a given area and that the areas themselves will be assigned a particular tier. As part of these provisions, the Framework includes the addition of a new and different tier, which was not included in the DPEIR or proposed alternative and the effects of which have not been thoroughly analyzed. Specifically, the Framework has altered the tiering system described in the DPEIR and Final EIR to add an additional tier that applies when it is “unknown” whether the discharge of the constituent from irrigated agriculture poses a low or high threat in a particular area. Depending on the application of this new requirement, this

represents a potential expansion of the scope of operations that would fall under this tier and potential increased obligations on the part of operations that fall into this category. In addition, as noted above in section III, this represents a significant new development added into the Framework that was not analyzed fully in the DPEIR or Final EIR which could have significant impacts on agricultural resources. The tiering system serves as a foundational element of the program that will ultimately determine the obligations and costs placed on each individual irrigated agricultural operation covered under the ILRP. To fundamentally alter that structure at this point in the process, particularly without appropriate analysis of environmental impacts of this change and re-circulation of the CEQA analysis, is inappropriate.

**IX. Potential Site-Specific Monitoring for All Irrigated Agricultural Operations as Contemplated Under the Framework Is Inappropriate**

Framework section 6(8) states that irrigated agricultural operations will be required to “[c]onduct any site-specific monitoring required by the Central Valley Water Board in conformance with any quality assurance/quality control requirements.” (Framework at p. A-15.) This provision could be read to require all irrigated agricultural operations to conduct individual discharge monitoring, an unnecessary requirement that exceeds the Central Valley Water Board’s authority under Water Code section 13267. Water Code section 13267 requires that the Central Valley Water Board’s request for technical information must be reasonable compared to the burden of compiling the information, including the cost. Specifically, this provision states that “[t]he burden, including costs, of these reports shall bear a reasonable relationship to the need for the report and the benefits to be obtained from the reports. In requiring those reports, the regional board shall provide the person with a written explanation with regard to the need for the reports, and shall identify the evidence that supports requiring that person to provide the reports.” (Wat. Code, § 13267(b)(1).) In many cases, the burden of preparing these reports associated with site-specific monitoring and conducting the individual site-specific monitoring will not bear a reasonable relationship between the Central Valley Water Board’s need for information as compared to the benefits to be obtained, as required under Porter-Cologne. Further, the request for such information must be supported by evidence as to why the information is necessary. The Framework does not acknowledge these restrictions nor does it identify why such information may be necessary from dischargers. Under this provision, the proposed site-specific monitoring is not necessarily related to an individual operation’s actual threat to water quality. Thus, the Framework assumes that all dischargers that fall within the scope of the program could be required to conduct any site-specific monitoring required by the Central Valley Water Board, apparently without limitation or consideration of the reasonableness of the monitoring required. Such a broad and unsupported requirement is inappropriate.

**X. The Framework Contains a New Tier 3 Nutrient Management Plan Requirement That Could Jeopardize Proprietary Information and Which May Be Unnecessarily Burdensome**

Framework section 6(10) states that irrigated agricultural operations in a Tier 3 groundwater basin for which nitrate is the identified constituent of concern will be required to “prepare a farm-specific nutrient management plan certified by a certified crop advisor and provide any required nutrient information for submittal to the third party or Central Valley Water Board.” (Framework at p. A-16.) This is a new requirement added as part of the Framework and was not analyzed or considered in any meaningful way in previous iterations. Furthermore, based on the confidentiality concerns cited above, it would be problematic for growers to submit a nutrient management plan to the Central Valley Water Board as contemplated under the Framework. Much of the information that would be required under these nutrient management plans is proprietary (in the nature of trade secrets) and not appropriate for release in the public domain, and it would be more appropriate to allow irrigated agricultural operations to continue to retain documents on-site and make those documents available for Central Valley Water Board inspection.

Finally, the requirement that a nutrient management plan under this provision must be “certified by a certified crop advisor” is impractical and constitutes an unnecessary expense. Many growers do consult and work with such professionals, but it is not necessary for these plans to be certified in order to be an effective management tool. Many growers have in-depth practical experience as well as formalized training in irrigation and nutrient management techniques and are able to develop effective plans without professional assistance. This certification requirement creates a new costly burden that many growers may not be able to afford. The Staff Report erroneously asserts that “[t]he only potential impact associated with nutrient management is additional planning and management costs, which may be largely offset by savings to fertilizer material and operations.” (Staff Report at p. 14.) There is no support cited for this assessment that the costs of this new requirement are minimal, nor that those costs can be offset by purported savings. Further, the certified crop advisor program is not established to fulfill a regulatory requirement as anticipated here. The certification program is a voluntary program and was not established to meet regulatory mandates set forth by regional water boards.

**XI. The Framework Contains an Individual Farm Water Quality Management Plan Requirement That Raises Similar Concerns**

Framework section 6(11) states that irrigated agricultural operations in a Tier 3 groundwater basin or watershed will be required to “prepare an individual farm water quality management plan certified by a certified crop advisor” if the Central Valley Water Board determines that adequate progress in the implementation of the regional GQMP or SQMP has not been made. (Framework at p. A-16.) This requirement raises a number of the same concerns as the nutrient management plan requirement, including the submission of

potentially proprietary and confidential information and the unnecessary and costly certification by a certified crop advisor.

**XII. The Framework Requires Farm-Specific Evaluations For All Irrigated Agricultural Operations, Exceeding the Central Valley Water Board's Authority Under Water Code Section 13267**

Framework section 7(3) indicates that all irrigated agricultural operations in all tiered areas must complete a farm-specific evaluation and identification of management practices for Central Valley Water Board inspection. (Framework at p. A-16.) These evaluations essentially require irrigated agricultural operations operating under the Framework to prepare and submit technical reports without any additional showing from the Central Valley Water Board. This is entirely inappropriate for a variety of reasons. The Central Valley Water Board does not have the authority to circumvent legally required findings in individual cases by requiring that all operations must submit these evaluations. A generic requirement that applies to all operations does not satisfy the individualized requirements of the statute given that there must be some justification for these evaluation requests. Water Code section 13267 authorizes the Central Valley Water Board to require reports from those who discharge waste, but that section also requires that the Board "provide the person with a written explanation with regard to the need for the reports" and "identify the evidence that supports requiring that person to provide the reports." (Wat. Code, § 13267.) Unless the Central Valley Water Board undertakes these activities in individual instances, it has not satisfied its burden, and cannot request that all operations submit farm-specific evaluations outlining their management practices. The Framework as currently written requires all operations to perform these farm-specific evaluations, without providing a written explanation or supporting evidence. This is inappropriate and unsupportable under Porter-Cologne.

**XIII. The Framework Threatens Individual Operations With Water Code Section 13267 Orders For Failure of Third-Parties to Submit SQMPs or GQMPs**

Framework section 7(7) states that "[f]ailure by a third party to submit a SQMP or GQMP that receives Executive Officer approval will result in the issuance of 13267 Orders requiring the irrigated agricultural operators in the affected areas to submit the required reports and information." (Framework at p. A-19.) This amounts to a highly coercive and inappropriate provision that threatens irrigated agricultural operations with "punishment" for circumstances that can be out of their control. As noted above, Water Code section 13267 requires that the Central Valley Water Board's request for technical information be reasonable as compared to the burden of compiling the information, including the cost, and the request for such information must be supported by an *individualized* determination and supporting evidence as to why the information is necessary. A third-party's failure to submit a SQMP or GQMP, or the failure of the Executive Officer to approve a submitted plan, would not be a sufficient basis for using a 13267 Order requiring individual irrigated agricultural operators to

submit such information. Failure of a report submitted by a grower to receive Executive Officer approval is not a satisfactory ground for issuing a Water Code section 13267 Order, and this provision amounts to a highly inappropriate threat against growers.

#### **XIV. The Framework Potentially Gives Too Much Discretion to the Executive Officer in Requiring Revisions or Modifications to SQMPs and GQMPs**

Framework section 7(9) states that “the Board or Executive Officer will determine whether and how the SQMP or GQMP should be updated based on new information and progress in achieving compliance with water quality objectives.” (Framework at p. A-19.) This provision implies that the Executive Officer has the authority to mandate an update or modification of SQMPs and GQMPs without restriction or consideration of specified factors, and suggests that the Executive Officer can require revision of those documents without any indication of what criteria must be considered or the need to justify the request. This is inappropriate and can lead to arbitrary results for third parties and the individual irrigated agricultural operations. For example, an Executive Officer, at his or her apparently unfettered discretion, could determine that “inadequate progress” is being made and, as a proposed solution under the Framework, could require individual irrigated agricultural operations to “develop and implement a FWQMP certified by a certified crop advisor.” (*Id.* at p. A-20.) The Framework does describe progress conditions in vague terms at page A-19 and A-20, but this is not a sufficiently specific barometer by which to make such a significant decision. Essentially this opens up all irrigated agricultural operations to the possibility of developing an individual Farm Water Quality Management Plan (FWQMP) if the Executive Officer determines that operation is making inadequate progress in plan implementation.

#### **XV. Under the Framework, Compliance With Time Schedules Will Be Improperly Determined Using First Encountered Groundwater**

Framework sections 10.1 and 10.2 indicate that the compliance schedules may be staggered between five and ten years, and compliance is considered to be demonstrated improvement in water quality or reduction in discharge based on evaluation of available data of *first encountered groundwater*. (Framework at pp. A-26 - A-27.) We are concerned that the Central Valley Water Board’s assessment and definition of groundwater for purposes of determining compliance is the first encountered groundwater. Most beneficial uses of groundwater do not actually occur in the first encountered groundwater, yet, under the Framework, compliance will be determined based on the quality of water in the first encountered zone. The Framework makes an improper assumption that measuring discharge from irrigated lands covered by the ILRP at the shallow first encountered groundwater level will provide an accurate picture of compliance and progress being made towards improvement in water quality. We do not believe this determination to be appropriate or supportable under Porter-Cologne. In addition, the proposed measurement of groundwater in the first encountered zone fails to take into account the assimilative capacity of soil in irrigated lands governed by the ILRP. There is considerable treatment that occurs as water

makes its way through the soil profile, and in many areas it can be reasonably expected that there will be significant dilution and attenuation of constituents prior to reaching any groundwater extraction point. Furthermore, because the lands covered by the LTILRP are so varied in soil composition, the assimilative capacities of those lands also vary, and indiscriminately using first encountered zone measurements may produce inconsistent and inaccurate results in measuring compliance. Because there is a substantial likelihood that groundwater data collected at the first encountered zone will bear little relationship to the actual impact on beneficial uses in that area, determining compliance with water quality objectives in the first encountered zone is inappropriate.

## **XVI. Concerns Regarding Individual FWQMP Requirements**

Framework section 13.3 describes the information to be included in the individual FWQMPs and also states that, in addition to the minimum elements identified, “the Executive Officer may require groundwater or surface water quality monitoring to evaluate the effectiveness of the practices implemented by the grower.” (Framework at p. A-32.) As noted above, in order to require an individual agricultural operation to conduct such monitoring and submit this information to the Central Valley Water Board, the Board must ensure that the burden of requesting these reports bears a reasonable relationship to the need for the report, and the Board must provide the operation with a written explanation with regard to the need for the reports along with evidence that supports requiring that operation to provide the reports. The monitoring requirements, while not fully defined and articulated in the Framework, could be insufficient to support requests pursuant to Water Code section 13267, and, as such, may fail to meet the Central Valley Water Board’s statutory burden. The Framework does not appear to limit these requests in this manner and would therefore, in some circumstances, be unsupportable under Porter-Cologne. In addition, this provision could provide the Executive Officer with far too much discretion, as there are no criteria or specified considerations governing when the Executive Officer can require monitoring to evaluate effectiveness of the practices implemented by the grower.

## **XVII. Conclusion**

In conclusion, we appreciate the opportunity to comment on the Staff Report and ILRP Framework. However, we remain very concerned that the Framework imposes a number of regulatory requirements that are overly burdensome, unnecessary, and unsupportable under the relevant Water Code provisions, and that this proposed regulation is not being properly adopted in compliance with legal standards. Moreover, the Framework contains a number of provisions that were not analyzed in the DPEIR and the impact of which has not been fully considered. Finally, the economic analysis supporting the Framework is inadequate and the timeframe for implementation remains far too aggressive. Thus, based on these concerns, we encourage the Central Valley Water Board to consider the comments provided above and modify the Framework in conformity with our suggestions.

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If you have any specific questions with respect to these comments, please contact Theresa “Tess” A. Dunham at (916) 446-7979. Thank you.

Sincerely,

California Cotton Ginners and Growers Association  
California Farm Bureau Federation  
California Rice Commission  
East San Joaquin Water Quality Coalition  
Sacramento Valley Water Quality Coalition  
San Joaquin County-Delta Water Quality Coalition  
South San Joaquin Irrigation District  
South San Joaquin Water Quality Coalition  
Western Growers Association  
Western Plant Health Association  
Westside San Joaquin River Watershed Coalition

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